

Memorandum of Understanding between the Canadian Environmental Assessment Agency (the Agency) and the British Columbia Environmental Assessment Office (EAO) on Substitution of Environmental Assessments (2013)

PREAMBLE

WHEREAS Canada and British Columbia each have robust environmental assessment processes established through legislation that include the assessment of environmental effects, timelines for government review and decisions, public participation and conditions for approval that are supported by compliance, enforcement and follow-up activities;

WHEREAS Canada and British Columbia are committed to effective and meaningful consultation with aboriginal groups;

WHEREAS Canada and British Columbia are committed to maintaining the rigor of environmental assessment and aboriginal consultation;

WHEREAS the Parties recognize that substitution means that two environmental assessment decisions will be made for each proposed project; one by the Government of Canada and one by the Government of British Columbia, based on the environmental assessment process conducted by EAO;

WHEREAS the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) provides authority to the Federal Minister of the Environment (Federal Minister) to approve substitution of the environmental assessment process under CEAA 2012 with the environmental assessment process under the *BC Environmental Assessment Act* (EAA) if the Federal Minister is satisfied that certain conditions are met and is of the opinion that the EAA process would be an appropriate substitute;

AND WHEREAS the Parties wish to provide clarity and predictability for all participants in substituted environmental assessments and facilitate efficient use of resources in the timely delivery of those assessments.

THEREFORE the Agency and EAO agree as follows:

1. PURPOSES

a) The purposes of this memorandum of understanding are to:

- i. facilitate information exchange between the Parties regarding proposed projects that may require an environmental assessment under both CEAA 2012 and EAA and may be candidates for substitution;
- ii. describe the roles and responsibilities of the Parties to enable timely and well-informed substitution decisions by the Federal Minister; and,
- iii. establish an administrative framework that will facilitate efficient and effective substituted environmental assessments, leading to environmental assessment decisions by the respective federal and provincial Ministers.

2. COORDINATION PRIOR TO REQUESTS FOR SUBSTITUTION

- a) From first knowledge of a proposed project that may require an environmental assessment under both CEAA 2012 and EAA, the Parties will share and discuss information that will facilitate timely and efficient consideration of substitution, including as appropriate:
 - i. whether the proposed project may be a candidate for substitution or is described within a class of projects where substitution has been approved by the Federal Minister;
 - ii. project descriptions;
 - iii. information on aboriginal consultation planning;
 - iv. whether environmental assessment by a review panel may be appropriate in the circumstances;
 - v. any views received from potential participants on the environmental assessment process, including substitution of the CEAA 2012 process to EAO; and,
 - vi. whether an environmental assessment is likely to be required, and the anticipated timing of the commencement of each Party's environmental assessment.
- b) Once EAO has indicated in writing to the Agency that British Columbia intends to request substitution, each Party when communicating with the proponent, aboriginal groups, the public and others with an interest in the environmental assessment, will advise that the British Columbia environmental assessment process may be substituted for the CEAA 2012 environmental assessment process.

3. REQUEST FOR SUBSTITUTION

- a) A request for a substitution, including for a class of designated projects, will be in the form of a letter from the British Columbia Minister responsible for the EAA, his or her Deputy Minister or the Executive Director under the EAA (BC Minister). The letter will confirm British Columbia's commitment to undertake the environmental assessment of the proposed project, in accordance with this memorandum of understanding.
- b) The Federal Minister will advise the BC Minister of his or her substitution decision in writing.
- c) The Parties agree that to provide clarity and certainty to all participants in the environmental assessment of a proposed project, the best practice would be for a substitution decision to be made at the time, or as close as possible to the time, when either the Agency reaches a decision on whether an environmental assessment is required under CEAA 2012 or where a proposed project has been designated by the Federal Minister under subsection 14(2) of CEAA 2012 as requiring an environmental assessment.
- d) Where the BC Minister makes a request for substitution prior to the Agency seeking public comments on the project description, the Agency:

- i. will provide its advice in support of the Federal Minister's decision on substitution in a timely manner, to enable the Federal Minister to make such a decision at the time, or as close as possible to the time, the Agency reaches a decision on whether an environmental assessment is required under CEAA 2012; and,
 - ii. will not proceed with a public comment period on draft environmental impact statement guidelines for the proposed project, unless the Federal Minister decides that substitution is not approved.
- e) Where the BC Minister makes a request for substitution after the Agency has sought public comments on a project description or after a proposed project has been designated by the Federal Minister under subsection 14(2) of CEAA 2012, the Agency, will provide its advice in support of the Federal Minister's decision on whether to approve substitution, within 45 days of the receipt of the request.
- f) In providing its advice to the Federal Minister, the Agency may identify federal jurisdictional interests, such as the potential for transboundary environmental effects or changes to the environment that may affect federal lands, that the Federal Minister may wish to consider in determining:
 - i. whether the British Columbia environmental assessment process is an appropriate substitute in the context of that designated project;
 - ii. whether he or she should specify any additional conditions to address the federal jurisdictional interests, prior to determining whether the British Columbia environmental assessment process is an appropriate substitute; and,
 - iii. whether referral of the environmental assessment to a review panel is in the public interest.
- g) In the event that the Federal Minister determines substitution is not approved, the Parties will discuss arrangements to conduct a cooperative assessment or a joint review panel.
- h) Where the BC Minister makes a request for substitution for a class of designated projects, the Agency will provide its advice in support of the Federal Minister's decision on whether to approve substitution for the class of designated projects, within 90 days of the receipt of the request.
- i) EAO will notify the Agency in writing if it is of the opinion that a proposed project is described within a class of designated projects approved for substitution by the Federal Minister.
- j) Within 10 days of receipt of the notification from EAO, the Agency will advise EAO whether it agrees that the proposed project is described in the relevant class of designated projects.

- k) Within 45 days of receiving an adequate project description from the proponent for a proposed project, described within a class of designated projects approved for substitution by the Federal Minister, the Agency will confirm to EAO:
 - i. whether an environmental assessment of the proposed project under CEAA 2012 is required; and,
 - ii. whether it has provided or will provide advice to the Federal Minister on whether referral of the environmental assessment to a review panel is in the public interest.
- l) If a referral to a review panel will be sought, the Parties will initiate discussion of the merits of conducting a joint panel review, pending the Federal Minister's decision.
- m) In the event that circumstances prevent the Agency from being able to meet the timelines set out in d), e), h, j) or k) the Agency will advise EAO.

4. REQUIREMENTS FOR A SUBSTITUTED ENVIRONMENTAL ASSESSMENT

- a) In the event the Federal Minister approves substitution for a designated project or a class of projects to British Columbia pursuant to section 32 of CEAA 2012, the BC Minister, the Executive Director, or their delegates as appropriate will:
 - i. consider the factors as set out in subsection 19(1) of CEAA 2012 when conducting the environmental assessment;
 - ii. ensure that any Orders under sections 11, 13 and 14 or 15 of the EAA require the subsection 19(1) factors; and,
 - iii. provide an environmental assessment report that includes the findings and conclusions of the environmental assessment with respect to factors as set out in subsection 19(1) of CEAA 2012.
- b) In conducting a substituted environmental assessment, EAO will:
 - i. request that federal departments in possession of specialist or expert information or knowledge with respect to the proposed project participate in the environmental assessment process; and,
 - ii. give the public an opportunity to participate in the environmental assessment process and provide access to records in relation to the assessment, to enable the meaningful participation of the public.
- c) EAO will provide an environmental assessment report to the Agency within a time frame that will enable the Federal Minister to reach an environmental assessment decision within the time limits set out in CEAA 2012 and will make the report available to the public.
- d) The Parties acknowledge that the commitments in paragraph 4(a) to (c) represent general policy of EAO in relation to substituted environmental assessments, and that nothing in paragraphs 4(a) to (c) fetters the discretion of statutory decision makers.

5. PROCEDURAL DELEGATION OF ABORIGINAL CONSULTATION

- a) The Parties acknowledge the respective duties of Canada and British Columbia to consult and, where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or treaty rights.
- b) The written approval by the Federal Minister of a request for substitution of an environmental assessment process will also, where appropriate, include procedural delegation to British Columbia of the gathering of information from Aboriginal groups about the impact of the proposed project on their potential or established aboriginal or treaty rights and ways to prevent, mitigate or otherwise address those impacts as appropriate.
- c) The Parties acknowledge that, notwithstanding the delegation of the procedural aspects of consultation, Canada and British Columbia each retain the responsibility to ensure that the duty to consult has been satisfied, including determining the Aboriginal groups to be consulted and determining the scope, content and adequacy of consultation.
- d) The details of the procedural delegation are set out in the Annex to this memorandum of understanding.
- e) Any consultation conducted by British Columbia with Métis or organizations representing Métis within British Columbia under a substituted environment assessment is understood to be conducted on behalf of the Government of Canada and should not be construed in any way as an acknowledgement by British Columbia that it owes a duty of consultation or accommodation to Métis within British Columbia under s.35 of the *Constitution Act*, 1982.

6. INFORMATION EXCHANGE DURING A SUBSTITUTED ENVIRONMENTAL ASSESSMENT

- a) To facilitate the effective and efficient exchange of information throughout a substituted environmental assessment, the Agency will appoint a person to act as liaison (Agency Liaison) with the individual identified by EAO to lead the environmental assessment for the proposed project (EAO Project Lead).
- b) The EAO Project Lead and the Agency Liaison will work together to identify federal departments in possession of specialist or expert information or knowledge with respect to the proposed project and contacts within those departments to identify representatives to participate in the environmental assessment working group.
- c) The EAO Project Lead will communicate with and, as appropriate, seek feedback from the Agency Liaison at key points in the substituted environmental assessment, including before finalizing the Application Information Requirements, upon receipt of an application from the proponent, and upon completion of the draft assessment report.

- d) The EAO Project Lead will keep the Agency Liaison apprised of the progress of the environmental assessment relative to the timeline for delivery of the environmental assessment report.
- e) The Parties will provide each other with:
 - i. any approvals, Orders or other statutory instruments under CEAA 2012 or EAA relevant to the substituted environmental assessment; and,
 - ii. wherever possible, advance notice of public notices and media releases.

7. DELIVERY OF THE ASSESSMENT REPORT AND ABORIGINAL CONSULTATION RECORD

- a) To assist in preparing their material in support of the decisions by each government, when a draft assessment report is completed, the EAO Project Lead will arrange a briefing with the Agency Liaison to present:
 - i. the draft assessment report, including conclusions regarding the significance of environmental effects as defined in sections 5(1) and 5(2) of CEAA 2012, mitigation measures related to those effects and any proposed conditions that may be placed upon the proponent; and,
 - ii. draft materials related to aboriginal consultation, including items referred to in Annex, as appropriate.
- b) Following the briefing under section 7(a), but before finalizing material in support of the decisions by each government, the Agency and EAO will discuss proposed conditions to prevent or mitigate environmental effects and to prevent, mitigate or otherwise accommodate impacts to potential or established aboriginal or treaty rights.
- c) Within a timeline agreed to by the Parties, the EAO Project Lead will:
 - i. provide to the Agency Liaison a final assessment report, including an executive summary of the assessment report in both official languages and final materials related to aboriginal consultation referred to in the Annex; and,
 - ii. coordinate with the Agency Liaison to deliver a joint briefing to the President of the Agency and the Executive Director of EAO.

8. COORDINATION OF DECISIONS AND ANNOUNCEMENTS

- a) The Parties will keep each other informed regarding their respective decision making processes.
- b) The Parties will coordinate the announcement of environmental assessment decisions by the respective federal and provincial ministers to the extent that is possible and practicable.

9. MONITORING AND FOLLOW-UP

- a) The Parties will coordinate their respective compliance monitoring and follow-up activities to the extent that is possible and practicable, including the development of joint compliance management plans and the identification of roles and responsibilities.

10. GENERAL PROVISIONS

- a) This memorandum of understanding represents the mutual understanding of the Parties, but does not create legally binding obligations. It does not create any new legal powers or duties, nor does it alter the powers and duties established by CEAA 2012 and EAA.

Implementation Steering Committee

- b) The Parties will each appoint a representative to co-chair a steering committee to facilitate the achievement of objectives of this memorandum of understanding and manage implementation by:
 - i. developing a Terms of Reference to be approved by the signatories of the memorandum of understanding;
 - ii. developing operational procedures, best practices, guidance and joint training to support the implementation of this memorandum of understanding;
 - iii. monitoring the implementation of substituted environmental assessments on an ongoing basis to identify opportunities to improve delivery and make amendments to this memorandum of understanding as necessary; and,
 - iv. resolving differences in the interpretation of this memorandum of understanding or arising from substituted environmental assessments that cannot be resolved by the EAO Project Lead and Agency Liaison.

Equivalency

- c) The Parties agree to explore at a later date, the implementation of equivalency, as provided under CEAA 2012.

Commencement

- d) This memorandum of understanding shall take effect upon signature by the Parties. The Parties may execute this memorandum of understanding by counterparts.

Revisions

- e) This memorandum of understanding may be amended at any time by agreement in writing, of the Parties.


Termination

- f) Following consultations between the Parties, this memorandum of understanding may be terminated by either Party, 45 days after written notice is provided to the other Party. Any decision to terminate this memorandum of understanding would have no effect on any substituted environmental assessments approved by the Federal Minister.

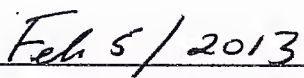
Signatures



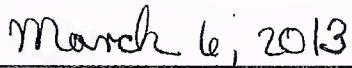
Dave Nikolejsin
Associate Deputy Minister
Environmental Assessment Office



Elaine Feldman
President
Canadian Environmental Assessment Agency



Date



Date

ANNEX

Procedural Delegation of Aboriginal Consultation

- 1) Once the Federal Minister has approved substitution, the Agency, in consultation with EAO, will write to Aboriginal groups, advising that the environmental assessment has been substituted and that procedural aspects of Aboriginal consultation for the environmental assessment have been delegated to EAO.
- 2) The EAO Project Lead will work with the Agency Liaison to identify which Aboriginal groups are to be consulted and the nature of the proposed consultation.
- 3) Consultation with Aboriginal groups may occur at various stages throughout the environmental assessment process and may be conducted by EAO and/or a proponent, as directed by EAO.
- 4) The nature of consultation will depend on the circumstances, including assessments of the strength of any claimed Aboriginal rights, and the seriousness of potential impacts to claimed or established Aboriginal or treaty rights and may include the opportunity for Aboriginal groups to:
 - i. participate in project working groups;
 - ii. review and comment on the draft section 11 Order, which legally requires the proponent to undertake certain consultation activities, including the development of a consultation plan and the consultation activities that will be undertaken by EAO;
 - iii. review and comment on the proponent's draft consultation plan;
 - iv. review and comment on the proponent's draft Application Information Requirements;
 - v. review and comment on the proponent's Application;
 - vi. review and comment on the draft Assessment Report prepared by EAO; and,
 - vii. engage in government-to-government discussions.
- 5) During the environmental assessment process, EAO will request that federal departments in possession of specialist or expert information or knowledge with respect to the project participate in the environmental assessment process. Through participation on project working group(s) and through the review of comments provided by Aboriginal groups on the draft Application Information Requirements, the proponent's Application, and the draft environmental assessment report, federal departments will have the opportunity to review and respond to issues raised by Aboriginal groups. In addition, EAO will share with federal participants, an Issues Tracking Table or equivalent document, also available to Aboriginal groups, which tracks comments and responses, including concerns of Aboriginal groups and how these concerns have been addressed. The Issues Tracking Table may also identify issues related to subsequent federal permitting processes and/or issues that are outside of the scope of the environmental assessment that may be relevant to the federal government.
- 6) The EAO Project Lead will provide the Agency Liaison with copies of the following:
 - i. Notification letters to Aboriginal groups relating to Orders made under sections 10 and 11 of the EAA;

- ii. the Consultation Plan and reports prepared by the proponent;
 - iii. the Issues Tracking Table at the following stages:
 - a. During the review of the draft Application Information Requirements;
 - b. During the review of the proponent's application;
 - c. At the time the draft consultation summary contained in the draft environmental assessment report is shared with the Agency Liaison;
 - d. At the conclusion of the environmental assessment; and,
 - e. Draft and final consultation summaries.
- 7) As appropriate, the Agency Liaison and the EAO Project Lead will discuss issues raised during the Aboriginal consultation process that may be referred to the federal government.
- 8) The EAO will continue to make funding available to Aboriginal groups during the pre-application and application review phases under British Columbia's environmental assessment process. The Agency and the EAO will develop an administrative mechanism through which the Agency will provide funds to the EAO that the EAO will combine with its funds and make available to Aboriginal groups to support consultation on substituted environmental assessments as set out in this Annex.
- 9) EAO will retain all relevant records pertaining to Aboriginal consultation during the environmental assessment, including correspondence, meeting summaries and notes to file and will make such records available upon request from the Agency.